MOTION FILED

NOV 1 6 2000

(3)

No. 00-596

IN THE

Supreme Court of the United States

LORILLARD TOBACCO CO., *et al.*,
Petitioners,

v.

THOMAS F. REILLY, Attorney General
of Massachusetts,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: November 16, 2000

AMERICAN FINANCIAL PRINTERS • WASHINGTON, DC • (202) 457-0030

IN THE
SUPREME COURT OF THE UNITED STATES

No. 00-596

LORILLARD TOBACCO CO., *et al.*,
Petitioners,

v.

THOMAS F. REILLY, Attorney General
of Massachusetts,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioners. Petitioners have consented to the filing of this brief; their letter of consent has been lodged with the Clerk of the Court. WLF has been unable to obtain the consent of Counsel for Respondent, thereby necessitating the filing of this motion.

WLF is a non-profit public interest law and policy center with supporters in all 50 states, including many in Massachusetts. WLF regularly appears before federal and state courts promoting economic liberty, free enterprise, and a limited and accountable government.

WLF devotes a substantial portion of its resources to protecting the right of commercial free speech, appearing before this Court in cases raising commercial speech issues. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). WLF recently successfully challenged the constitutionality of Food and Drug Administration restrictions on commercial speech. *Washington Legal Foundation v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dismissed*, 202 F.3d 331 (D.C. Cir. 2000). WLF filed an *amicus curiae* brief in this case when it was before the court of appeals.

WLF also believes strongly in the importance of preserving the policy of national uniformity embodied in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et seq.* ("FCLAA"). That policy strongly reinforces First Amendment values and, consequently, commercial free speech rights by limiting state and local power to restrict advertising.

WLF fully supports Petitioners' request that the Court grant review of both of the Questions Presented in this Petition. WLF writes separately in order to emphasize the overriding importance of the First Amendment claims and the need for the Court to clarify the doctrinal foundations supporting government attempts to suppress truthful commercial speech. Because the split among the appeals court regarding the meaning of the FCLAA is so clear, the

Court might give thought to focusing on the FCLAA issue alone and denying review on the First Amendment issue. WLF urges the Court not to follow that course. Rather, WLF urges that review be granted on both issues. This is an especially appropriate case for the Court to re-examine the conflicting strands of commercial speech law that have troubled numerous members of the Court in recent years.

WLF has no direct interest, financial or otherwise, in the outcome of this case. Accordingly, WLF believes that it can bring a perspective on the issues presented that is distinct from that of any of the parties.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: November 16, 2000

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that Massachusetts regulations that sharply limit the public display of cigarette advertisements do *not* impose prohibitions "with respect to the advertising or promotion" of cigarettes within the meaning of the preemption provision of the Federal Cigarette Labeling and Advertising Act.

2. Whether Massachusetts's prohibition on virtually any public display of truthful and nonmisleading tobacco advertisements violates the First Amendment, either under the strict scrutiny standard that Petitioners contend is applicable or under the test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 7

I. THE COURT SHOULD CLARIFY THE PROPER STANDARD TO APPLY IN CHALLENGES TO BLANKET RESTRICTIONS OF TRUTHFUL, NONMISLEADING COMMERCIAL SPEECH . 9

A. The Court Should Grant Review to Consider Whether, in Practice, the *Central Hudson* Test Provides Sufficient Protection to Truthful Commercial Speech 9

B. The Court Should Grant Review in Order to Correct the First Circuit's Misapplication of *Central Hudson* 14

II. THE COURT SHOULD RESOLVE THE IRRECONCILABLE CONFLICT AMONG THE FEDERAL APPEALS COURTS REGARDING THE SCOPE OF FCLAA PREEMPTION 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases:

Bates v. State Bar of Arizona,
433 U.S. 350 (1977) 10
Bolger v. Youngs Drug Prods. Corp.,
463 U.S. 60 (1983) 12
Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) . . . . . *passim*
City of Cincinnati v. Discovery Network, Inc.,
507 U.S. 410 (1993) 15
Edenfield v. Fane,
507 U.S. 761 (1993) 15
44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) . . . . . *passim*
Federation of Advertising Industry Representatives, Inc. v. Chicago, 189 F.3d 633 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 1671 (2000) 18
Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173 (1999) 6, 12
Greater New York Metropolitan Food Council, Inc. v. Giuliani, 195 F.3d 100 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 1671 (2000) 18
Ibanez v. Florida Dep't of Bus. and Prof'l Regulation, 512 U.S. 136 (1994) 10, 14
Lindsey v. Tacoma-Pierce County Health Dep't,
195 F.3d 1065 (9th Cir. 1999), *amended*,
205 F.3d 1150 (9th Cir. 2000) 17
Linmark Associates, Inc. v. Willingboro,
431 U.S. 85 (1977) 11

Page

Penn Advertising of Baltimore, Inc. v. Mayor & City Council, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded on other grounds*, 518 U.S. 1030 (1996), *adopted as modified*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997) 18

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) 14, 15, 16

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) . . 9, 12

Statutes, Regulations and Constitutional Provisions:

U.S. Const., amend. i . . . . . *passim*

Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1331 *et seq.* . . . . . *passim*

§ 1331 . . . . . 5, 18

§ 1334(b) 5

940 CMR §§ 21.00 *et seq.* 2

§ 21.04(5)(a) 2

§ 21.04(5)((b) 4

§ 21.04(6) 3

IN THE
SUPREME COURT OF THE UNITED STATES

No. 00-596

LORILLARD TOBACCO CO., *et al.*,
Petitioners,

v.

THOMAS F. REILLY, Attorney General
of Massachusetts,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set forth in the motion accompanying this brief.[1]

---

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement contained in the Petition for a Writ of Certiorari.

In brief, Petitioners challenge regulations (the "Regulations") promulgated by the State of Massachusetts in January 1999 that virtually eliminate the ability of manufacturers, distributors, and retailers of tobacco products to provide truthful brand and pricing information to lawful adult consumers of tobacco products by means of "outdoor" advertising. *See* 940 CMR §§ 21.00 *et seq.*[2]

The Regulations prohibit maintaining any tobacco advertisement within 1,000 feet of any school, park, or playground. 940 CME § 21.04(5)(a). The prohibited zone covers between 87% and 91% of the land area in the cities of Boston, Worcester, and Springfield. Petition Appendix ("Pet. App.") 79a. The district court determined that the zone "effectively bans nearly all outdoor advertising, and captures nearly all retail establishments in those cities." *Id.* The Regulations apply to *all* outdoor tobacco advertising, without regard to the truthfulness of the advertisement or whether it actually misleads any consumers.

Petitioners filed suit in May 1999 in U.S. District Court for the District of Massachusetts, challenging the Regulations on two principal grounds. First, Petitioners argued that the Regulations were preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331

---

[2] The definition of "outdoor" advertising includes advertising inside a store that is visible from the outside.

et seq. ("FCLAA"), which imposes strict limits on state regulation of tobacco advertising. Second, Petitioners argued that the Regulations violated the First Amendment right to engage in truthful commercial speech.

On December 2, 1999, the district court held that the Regulations were in large measure *not* preempted by the FCLAA. Pet App. 46a-60a. The court held that the Regulations focused principally on the *location* of tobacco advertisements, and that the FCLAA's preemption provision applies only to state and local laws that seek to regulate the *content* of such ads. *Id.* at 55a-56a. While conceding that the preemption provision of the FCLAA could be interpreted as applying to the Regulations if one's analysis focused on the FCLAA's language (*id.* at 53a), the court rejected that interpretation because it would "leav[e] states essentially powerless" to exercise their "inherent police powers to regulate smoking" -- powers that (the court believed) Congress intended to protect. *Id.* at 54a-55a.

The district court also upheld provisions in the Regulations that outlaw (in the absence of age verification) certain tobacco product promotional techniques, including sampling, promotional give-aways, and offering gifts to tobacco purchasers. The court held that those provisions were not preempted by the FCLAA because they addressed the illegality of underage smoking, not the relationship between smoking and health. *Id.* at 58a-59a.[3]

---

[3] The court held that the FCLAA did preempt a provision of the Regulations that permitted "tombstone advertising" -- small signs placed outside retail establishments stating "Tobacco Products Sold Here." 940 CMR § 21.04(6). Pet. App. 57a. The court went on to hold that § 21.04(6) was severable from the remainder of the Regulations and thus

(continued...)

On January 24, 2000, the district court rejected Plaintiffs' First Amendment challenge to the Regulations, granting summary judgment to Massachusetts. Pet. App. 61a-104a. Initially, the court rejected Petitioners' argument that the Regulations should be subject to a heightened standard of review, higher than the standard of review for commercial speech set forth in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). *Id.* at 65a-68a. The court held that the Regulations survived the *Central Hudson* test because they directly advanced a substantial government interest (reducing youth smoking) in a manner no more extensive than necessary. *Id.* at 68a-83a. The court held that Massachusetts's evidence was sufficient to establish as a matter of law that "it was reasonable" for the Attorney General to conclude that the goal of reducing youth smoking "would be advanced in some material respect" by restricting tobacco advertising. *Id.* at 74a. The court also held as a matter of law that virtually all of the restrictions on advertising were sufficiently narrowly tailored to pass constitutional muster "[i]n light of the marginal success" of all the state's non-speech-related efforts to control youth smoking. *Id.* at 78a.[4]

---

[3](...continued)
that the remaining provisions were fully enforceable. *Id.* The effect of this ruling was to render the Regulations more restrictive of commercial speech than as originally promulgated. Massachusetts did not appeal from this aspect of the district court's ruling.

[4] The court struck down one provision on First Amendment grounds: 940 CMR § 21.04(5)(b), which prohibited indoor, point-of-sale tobacco advertising less than five feet from the floor. The court held that Massachusetts failed to demonstrate that this provision was not more extensive than necessary to serve the state's interest in reducing
(continued...)

On July 17, 2000, the First Circuit affirmed in substantial part. Pet. App. 1a-45a. With respect to FCLAA preemption, the appeals court said that the Regulations involved legislation in a field "traditionally occupied" by the States and thus that it would invoke a strong "presumption against preemption." *Id.* at 7a-9a. In interpreting the FCLAA language it viewed as key -- the preemption of State laws "with respect to the advertising or promotion of any cigarettes" (15 U.S.C. § 1334(b) -- the Court said that the language should not be given a "hyper-literal reading," because otherwise the FCLAA would preempt a broad range of State regulation "which Congress surely did not intend to affect." *Id.* at 10a.

Rather, the court deduced the meaning of § 1334(b) by turning to the FCLAA's statement of purpose, 15 U.S.C. § 1331. The court noted two purposes listed in § 1331: (1) to inform the public of the health risks associated with smoking; and (2) to protect the national economy from the burdens that would result from a multitude of "diverse, nonuniform, and confusing" advertising standards. *Id.* The court determined that the Regulations offended neither of those purposes and thus were not preempted. It held that the Regulations were merely "location" restrictions, not an effort to regulate the content of any tobacco advertising. *Id.* at 12a-13a. It held that to the extent that the Regulations contributed to the nonuniformity of tobacco advertising restrictions nationwide, "such divergent restrictions are indistinguishable from the existing zoning regulations in place throughout the country. *Id.* at 13a.

---

[4](...continued)
youth smoking. *Id.* at 82a.

With respect to the First Amendment claims, the First Circuit rejected Petitioners' argument that -- in light of the near-total prohibition on truthful tobacco advertising based solely on its content[5] -- heightened review (*i.e.*, review beyond that required by *Central Hudson*) was in order. *Id.* at 14a-16a. The court cited *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999), for the proposition that heightened review is inappropriate even when regulations single out the promotional speech of a particular industry. *Id.* at 15a. The court acknowledged "rumblings from members of the Supreme Court and others suggesting that the *Central Hudson* test may be in need of minor or major modification"; but it felt "bound to apply the *Central Hudson* test, as is, to this case," because it was not the court's role "to anticipate changes in well-established constitutional doctrines." *Id.* at 16a.

The court then determined that the Regulations passed muster under the *Central Hudson* test. Pet. App. 17a-35a. Because the court was reviewing the grant of summary judgment for Massachusetts, it assumed that the speech at issue was truthful, nonmisleading speech about a lawful activity. The court determined that Massachusetts had a substantial interest in preventing children from smoking (*id.* at 18a), that the Regulations "directly advance" that interest by reducing underage smoking to a material degree (*id.* at 19a-29a), and that the Regulations do not restrict more speech

---

[5] The appeals court rejected out of hand Massachusetts's suggestion that the Regulations did not amount to content-based speech restriction. *Id.* at 14a.

than is necessary to achieve the State's purpose. *Id.* at 29a-35a.[6]

REASONS FOR GRANTING THE PETITION

The short-comings of the *Central Hudson* test could not be more starkly illustrated than they are in this case. Applying that test in an apparently good-faith manner, the First Circuit upheld a virtually total ban on outdoor tobacco advertising in the Commonwealth of Massachusetts. The ban was upheld even though: (1) the speech at issue was wholly truthful and non-misleading and concerned a lawful product; (2) there was no evidence that the speech was directed at minors; (3) the court of appeals conceded that the ban was content-based -- the *only* type of speech prohibited is speech that promotes the use or sale of tobacco products; (4) the evidence was equivocal at best regarding whether the Regulations would reduce underage smoking to a material degree; and (5) other methods that do not involve restricting speech could be used to achieve the State's purpose.

Any First Amendment test that could even arguably be applied to uphold sweeping speech restrictions of the type at issue in this case has little to recommend itself. The Court has repeatedly recognized that commercial speech -- while standing somewhat lower in the First Amendment pantheon

---

[6] The court reversed the district court's sole First Amendment ruling in support of Petitioners -- the district court's decision to strike down the prohibition against indoor, point-of-sale tobacco advertising less than five feet from the floor. *See* Note 4, *supra.* In upholding the prohibition, the appeals court stated that its earlier *Central Hudson* analysis was equally applicable and that "the fit between ends and means" was "very reasonable." *Id.* at 35a-37a.

than does political speech -- is still entitled to substantial constitutional protection. But the *Central Hudson* test as applied here provides virtually no First Amendment protection; as construed by the First Circuit, *Central Hudson* has become an elastic concept that requires judicial deference to virtually any government commercial speech restriction imposed under the banner of children's welfare.

WLF respectfully submits that the time has come for the Court to reconsider the continued usefulness of the *Central Hudson* test. WLF submits that any test adopted by the Court should evaluate the constitutionality of commercial speech restrictions based on whether they focus on any of the concerns that have led the Court to distinguish between commercial and noncommercial speech. Given the sweeping nature of the speech restrictions upheld in this case in the name of *Central Hudson*, this case provides a particularly appropriate vehicle for the Court to undertake that reconsideration.

WLF fully concurs with Petitioners that review should also be granted on the FCLAA issue. The conflict among the federal appeals courts regarding whether tobacco advertising restrictions of the type imposed by the Regulations are preempted by the FCLAA could not be more stark. But WLF nonetheless believes that the clear cert-worthiness of the FCLAA issue should not be permitted to obscure the importance of the First Amendment issues raised by this case. Any grant of review in this case should include *both* the FCLAA issue and the First Amendment issue.

I. THE COURT SHOULD CLARIFY THE PROPER STANDARD TO APPLY IN CHALLENGES TO BLANKET RESTRICTIONS OF TRUTHFUL, NONMISLEADING COMMERCIAL SPEECH

A. The Court Should Grant Review to Consider Whether, in Practice, the *Central Hudson* Test Provides Sufficient Protection to Truthful Commercial Speech

The importance of advertising in our free-market economy cannot easily be overstated. As the Court has recognized, commercial messages have played "a central role in public life" in this country since colonial times. *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 495 (1996) (plurality opinion). In recognition of that role, the courts have held that "the First Amendment protect[s] the dissemination of truthful and nonmisleading commercial messages about lawful products and services." *Id.*

Nonetheless, governments generally have been afforded somewhat more leeway in regulating commercial speech than other forms of speech. That greater leeway has been justified in large part by states' strong interest in protecting consumers from false or misleading information that could result in fraudulent transactions. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772 & n.24 (1976). States also have an interest in restricting "some forms of aggressive sales practices that have the potential to exert 'undue influence' over consumers." *44 Liquormart,* 517 U.S. at 498

(plurality) (citing *Bates v. State Bar of Arizona,* 433 U.S. 350, 366 (1977)).

But where, as here, the commercial speech at issue is neither false nor inherently misleading, nor proposes an illegal transaction, the Court has been extremely reluctant to permit speech restrictions that amount to a ban on wide-ranging categories of commercial speech. As the Court recently observed, "[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *44 Liquormart,* 517 U.S. at 501 (plurality). Such "complete speech bans" are "particularly dangerous" because "they all but foreclose alternative means of disseminating certain information." *Id.* The Court went so far as to state categorically in one recent case that "*only* false, deceptive or misleading commercial speech may be banned." *Ibanez v. Florida Dep't of Bus. and Prof'l Regulation,* 512 U.S. 136, 142 (1994) (emphasis added).

The Regulations do not, of course, *completely* ban all cigarette advertising within Massachusetts. A Boston store wishing to inform the public that it sells a particular brand of cigarettes is still free to post a sign to that effect somewhere in the 9% of the city in which cigarette advertising is permitted, or to take out a newspaper advertisement. But such advertising is not a realistic alternative for many store owners; a sign posted miles from the store is unlikely to be read by the store's potential customers, and the prohibitive cost of newspaper advertisements places such advertising out of reach of most individual merchants. The Court has stated repeatedly that commercial speech restric-

tions will be subjected to heightened scrutiny even when they do not completely prohibit dissemination of truthful information about a lawful product, if those restrictions fail to leave open satisfactory alternative channels of communications. *See, e.g., 44 Liquormart,* 517 U.S. at 501-02 (plurality) (Rhode Island law prohibiting truthful advertising of liquor prices subjected to heightened scrutiny, even though merchants permitted to display in-store signs listing prices); *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 92-94 (1977) (ban on "For Sale" signs in front of residential housing failed to provide satisfactory alternative means of informing the public that a particular house was for sale, because "For Sale" signs were the principal means by which such information was traditionally conveyed).

As the Court has made clear, government bans on commercial speech are anathema to the First Amendment when designed not to guard consumers from false or misleading information, but rather as an indirect means of regulating conduct. Such bans are premised on the assumption that the government knows best what is good for consumers and that they are better off if they are denied access to certain information, even though it is not in any way misleading. The Court has labeled such assumptions "offensive" to First Amendment values:

> Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond "irrationally" to the truth. *Linmark,* 431 U.S., at 96. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the public perceives to be their own

> good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products.

44 Liquormart, 517 U.S. at 503 (plurality); *see also id.* at 517 (Scalia, J., concurring in part); *id.* at 526-27 (Thomas, J., concurring in part); *Virginia State Board of Pharmacy,* 425 U.S. at 762 ("the general rule is that the speaker and the audience, not the government, assess the value of the information presented.").

The Regulations could not survive the strict First Amendment review that the Court's recent opinions suggest is required of all laws that impose total or near-total bans on non-misleading commercial speech. The result of the Regulations is to deprive consumers of significant amounts of truthful information. Massachusetts insists, of course, that its purpose is to keep this information away from *minors*, who are prohibited by law from purchasing cigarettes. But the Court has rejected broad commercial speech bans even when their ostensible purpose was to protect children from the speech, noting that under the First Amendment the "government may not reduce the adult population . . . to reading only what is fit for children." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-74 (1983).

The First Circuit nonetheless rejected Petitioners' First Amendment challenge to the regulations, invoking the *Central Hudson* test. That result suggests the existence of considerably tension between *Central Hudson* and more recent decisions of the Court. Indeed, that tension was acknowledged in *Greater New Orleans* (527 U.S. at 184) and by several of the opinions in *44 Liquormart. See, e.g.,*

44 Liquormart, 517 U.S. at 526-28 (Thomas, J., concurring in part). WLF respectfully suggests that this case provides an appropriate vehicle for reconsidering the *Central Hudson* test.

The essential shortcoming of *Central Hudson* is that it really is no test at all. It permits content-based government regulation of commercial speech where the government has a substantial interest that is directly served by the regulation and where the regulation is no more extensive than necessary to achieve the substantial interest. As applied to speech which the government wishes to keep away from children, *Central Hudson* can be construed (as did the First Circuit) as imposing no constitutional limits whatsoever. Under the First Circuit's view, *any* amount of speech about activities inappropriate for children could induce some amount of that activity among children. Because it is virtually impossible to ensure that *no* children will be exposed to such speech, the effect of the First Circuit's interpretation of *Central Hudson* is to eliminate *all* First Amendment controls over even blanket bans on truthful speech about adult-only activities. Indeed, that is precisely the situation here; despite Massachusetts's insistence that the Regulations are (in some unfathomable way) "carefully tailored" in a manner designed to protect children, the Regulations effectively ban all outdoor advertising of tobacco products.

WLF respectfully suggests that the Court grant review in order to modify the *Central Hudson* test and to clarify that blanket bans on truthful, nonmisleading commercial speech are subject to strict First Amendment scrutiny. Such strict scrutiny would be applied whenever, as here, the purposes underlying the more-relaxed standard of review

often applied to commercial speech (principally, a desire to preserve a fair bargaining process by ensuring that consumers are not misled by inflated sales pitches, *44 Liquormart,* 517 U.S. at 501 (plurality opinion)) are not implicated by the regulation in question.

Review for the purpose of reconsidering the *Central Hudson* test would be highly appropriate not only because of the sweeping nature of the ban on truthful speech in this case but also because the issue was fully briefed and ruled upon by the courts below.

B. The Court Should Grant Review in Order to Correct the First Circuit's Misapplication of *Central Hudson*

The Court should grant review on the First Amendment issue for the additional reason that the First Circuit's decision is inconsistent with *Central Hudson.* The Regulations could not survive scrutiny under the third and fourth prongs of the *Central Hudson* standard.

Under the third and fourth prongs of the *Central Hudson* test, commercial speech that is not false, deceptive, or misleading may be restricted, but only if the government shows that the restriction "directly and materially advances a substantial state interest," and that the restriction advances that interest "in a manner no more extensive than necessary to serve that interest." *Ibanez*, 512 U.S. at 142. *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995) (quoting *Central Hudson*, 447 U.S. at 562).

The third prong ("directly advances") requires the government to prove that its restriction "will in fact"

produce the desired result. A governmental body seeking to sustain a restriction on commercial speech "must demonstrate that the harms it recites are real and that a restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). "The regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Id.*

The fourth prong ("no more extensive than necessary") requires the government to demonstrate that the restriction is "sufficiently tailored to its goal." *Coors*, 514 U.S. at 491-492. A restriction on commercial free speech is not "sufficiently tailored to its goal" if there exist other means by which the government could pursue its objectives "in a manner less intrusive to First Amendment rights." *Id.* at 491. *See also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993).

The Court has stated time and again that the government bears the burden of justifying its commercial speech restrictions. *See e.g. Coors*, 514 U.S. at 487-88; *Ibanez*, 512 U.S. at 143. The Court has stressed that the government's burden under the *Central Hudson* test "is not satisfied by mere speculation and conjecture." *Edenfield*, 507 U.S. at 770.[7]

---

[7] This case cannot be distinguished from other challenges to commercial speech regulations on the ground that the product being advertised is alleged to constitute a vice. The Court in *44 Liquormart* expressly rejected the notion that a "vice" exception exists for First Amendment protection of commercial speech. Justice Stevens explained, "[A] vice label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled

(continued...)

The First Circuit appears to have misapplied the third and fourth prongs of the *Central Hudson* test in concluding that Massachusetts, as a matter of law, had met its burden of persuasion with respect to those issues. With regard to the third prong, it is highly question whether the State can "demonstrate" that its advertising ban "will in fact" serve its asserted objective of promoting the enforcement of state law against selling tobacco to minors "directly and materially." To the contrary, Massachusetts's claim that banning tobacco advertising would decrease unlawful sales to minors is based entirely on "mere speculation and conjecture." No reliable, objective evidence exists to support the claim.[8]

With regard to the fourth prong, there is considerable evidence that the Regulations are not "sufficiently tailored to its goal" because other means exist by which Massachusetts could pursue its goal "in a manner less intrusive to First Amendment rights." Instead of banning tobacco advertising in order to prevent unlawful sales of tobacco to

---

[7](...continued)
justification for the regulation of commercial speech about that activity." *44 Liquormart*, 517 U.S. at 514 (plurality); *see also, Rubin v. Coors*, 514 U.S. at 482 n.2. Thus, the district court's conclusion that tobacco *sales* are akin to the sale of pornography (Pet. App. 61a-62a) cannot justify relaxing First Amendment constraints on state regulation of tobacco *advertising*.

[8] In *44 Liquormart*, the Court was willing to accept the "common sense" notions that eliminating price advertising would lead to somewhat higher prices and consequent decreased demand for liquor. But the Court rejected the argument that, in the absence of other evidentiary support, such common sense notions were sufficient for a State to carry its burden of demonstrating that a price advertising ban would "significantly advance" the State's interest in decreased liquor consumption. *44 Liquormart*, 517 U.S. at 505 (plurality).

minors -- which has the effect of preventing the entire adult population from reading such advertising and of prohibiting merchants from effectively marketing their products -- the State could increase efforts to *enforce* the laws prohibiting tobacco sales to minors. Indeed, the First Circuit admitted the existence of such options but nonetheless said that Massachusetts should be permitted to ban speech as an alternative to adopting other options. Pet. App. 32a-33a.

Numerous State and local governments have, like Massachusetts, adopted virtual bans on truthful outdoor tobacco advertising. Review is warranted on the First Amendment issue in order to correct the error below and to provide guidance to courts considering challenges to other such statutes.

II. THE COURT SHOULD RESOLVE THE IRRECONCILABLE CONFLICT AMONG THE FEDERAL APPEALS COURT REGARDING THE SCOPE OF FCLAA PREEMPTION

Little need be said, beyond what was already said in the Petition, regarding the urgent need for the Court to resolve the irreconcilable among the federal appellate courts regarding the scope of FCLAA preemption.

The Ninth Circuit has held that the FCLAA preempts State and local government advertising regulations of precisely the sort at issue in this case. *Lindsey v. Tacoma-Pierce County Health Dep't,* 195 F.3d 1065 (9th Cir.1999), *amended,* 205 F.3d 1150 (9th Cir. 2000).[9] Three other

---

[9] The municipal defendant in *Lindsey* did not seek Supreme Court (continued...)

federal appeals courts (besides the court below) have arrived at precisely the opposite conclusion. *Greater New York Metropolitan Food Council, Inc. v. Giuliani,* 195 F.3d 100 (2d Cir. 1999), *cert. denied,* 120 S. Ct. 1671 (2000); *Federation of Advertising Industry Representatives, Inc. v. Chicago,* 189 F.3d 633 (7th Cir. 1999), *cert. denied,* 120 S. Ct. 1671 (2000); *Penn Advertising of Baltimore, Inc. v. Mayor & City Council,* 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded on other grounds,* 518 U.S. 1030 (1996), *adopted as modified,* 101 F.3d 332 (4th Cir. 1996), *cert. denied,* 520 U.S. 1204 (1997). Indeed, the First Circuit expressly noted the direct conflict among those four decisions. Pet. App. 9a-13a. The First Circuit adopted the reasoning of the Second and Seventh Circuits and stated explicitly that it disagreed with the Ninth Circuit's holding. *Id.* at 13a n.7.

The need to resolve an inter-circuit split is particularly acute in this case in light of the large number of tobacco advertising prohibitions being adopted (and subsequently challenged) throughout the country. *Id.* at 128a-134a (listing 20 such laws). Moreover, for so long as it remains true that citizens in the nine states comprising the Ninth Circuit have greater rights to engage in truthful commercial speech than do citizens living within the First, Second, Fourth, and Seventh Circuits, the essential purpose of the FCLAA -- to protect the national economy from the burdens that would result from a multitude of "diverse, nonuniform, and confusing" advertising standards -- will be frustrated. 15 U.S.C. § 1331.

---

[9](...continued)
review of the Ninth Circuit's decision. Thus, the Court does not have the option of granting review in that case instead of in this one.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari with respect to both of the Questions Presented.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: November 16, 2000